APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. No. 2534-58

AMERICAN TRUCKING ASSOCIATIONS, INC.,
THE CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION,
CONVOY COMPANY,
ROBERTSON TRUCK-A-WAYS, INC.,
HADLEY AUTO TRANSPORT,
B & H TRUCKAWAY,
WESTERN AUTO TRANSPORTS, INC., and
KENOSHA AUTO TRANSPORT CORP.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

and

PACIFIC MOTOR TRUCKING COMPANY and
GENERAL MOTORS CORPORATION,
Intervening Defendants.

OPINION

Before BASTIAN, Circuit Judge, and KEECH and CURRAN, District Judges, sitting as a statutory three-judge court.

KEECH, District Judge:

This is an action by certain motor carrier trade associations and motor carriers to set aside an order of the

Interstate Commerce Commission entered September 9, 1958, which directed the issuance, under certain conditions, of motor contract carrier permits under § 209(b) of the Interstate Commerce Act [49 U.S.C. § 309(b)] authorizing Pacific Motor Trucking Company of San Francisco, California, to transport automobiles and trucks, except trailers, in initial movements in truckaway and/or driveaway service, from plants of the General Motors Corporation at Oakland, Raymer, and South Gate, California, to certain named off-rail points in Nevada, and to all points in Oregon, Nevada, Utah, Arizona, and New Mexico which are stations on the rail lines of the Southern Pacific Company.

Pacific Motor Trucking Company (hereinafter referred to as PMT) is a wholly owned motor carrier subsidiary of Southern Pacific Company (hereinafter referred to as SP), which operates an extensive railroad system in Oregon, California, Nevada, Utah, Arizona, New Mexico, and Texas.

PMT since December 10, 1935, has held contract carrier operating authority from the Railroad Commission of California for intrastate operations within that State. The Interstate Commerce Commission (hereinafter referred to as the Commission) has issued to PMT four prior contract carrier permits for transportation of new automobiles, new trucks, and new buses, in initial movements in truckaway and driveaway service (1) from Oakland, California, to the non-rail point of Hawthorne, Nevada, and Nevada rail points on the Southern Pacific (MC 78787, Sub 23, issued June 20, 1944); (2) from Los Angeles, California, to Calexico and San Ysidro, California, both on the Mexican border (MC 78787, Sub 27, issued April 21, 1950); (3) from Raymer, California, to points in the Los Angeles Harbor Commercial Zone, for transshipment by water (MC 78787, Sub 30, issued June 22, 1950); and (4) from Oakland, California, to Carson

City and Minden, Nevada, both being non-rail points (MC 78787, Sub 31, issued June 21, 1955). PMT's only shipper under these permits has been GM. Thus, prior to filing of the four new applications involved in this case, the Commission had issued to PMT contract carrier operating authority from GM plants in California for physically interstate service across the state line into Nevada, and for foreign commerce physically within California.

The order complained of grew out of extensive proceedings before the Commission following the filing of the four applications by PMT, seeking to extend its service as a contract carrier for GM in the Pacific Coast area for the transportation of a single commodity, new automobiles and trucks. In general, by the Sub 34 application, PMT sought to extend its contract carrier service from the two GM Chevrolet plants at Oakland, California, to all Oregon points which are stations on SP; by the Sub 35 application, the right to serve three additional non-rail points in Nevada from Oakland, California; by the Sub 36 application, to serve all Arizona points which are stations on SP; and by the Sub 37 application, authority to round out its service areas from the Oakland and Raymer plants to include all points in the seven states of Washington, Oregon, Idaho, Nevada, Utah, Arizona, and New Mexico, whether or not they are stations on SP, and to begin new service from the Buick-Oldsmobile-Pontiac plant at South Gate, California, to a seven-state area, namely, Washington, Oregon, Idaho, Nevada, Utah, Arizona, and Montana. The four sub-proceedings were finally consolidated in Sub 37, from which the order complained of emanated. All of the plaintiffs in this action, who had been protestants in one or more of the other sub-numbers, participated in the consolidated proceeding before the Commission.

By the order here under attack, the Commission granted the authority sought in the Sub 35 proceeding, service

from the Oakland plant to three additional non-rail points in Nevada, which had been opposed by only one protestant, not a party to this action; but as to the Sub 34, 36, and 37 applications, the Commission denied entirely the authority requested to serve destinations in states not served by SP (Washington, Idaho, and Montana) and limited the authority granted to destinations in the other states (Arizona, Nevada, Oregon, Utah, and New Mexico) to points located on the rail lines of SP. Thus, the Commission's order granted only a limited portion of the authority sought in the four applications, and issuance of the new permits thereunder was conditioned on curtailment of existing common carrier authority to transport automobiles and trucks.

This action to set aside the Commission's order and for a temporary restraining order and for interlocutory and permanent injunction against issuance of the permits authorized thereby, was brought under the provisions of § 205(g) of the Interstate Commerce Act [49 U.S.C. § 305(g)], § 10 of the Administrative Procedure Act [5 U.S.C. § 1009], and §§ 1336, 1398, 2284, and 2321 to 2325 of the Judicial Code [28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325]. The plaintiffs' motion for a temporary restraining order was denied after hearing. On November 24, 1958, permits for the operations authorized by the order were issued by the Commission. The prayer for injunction was thereafter abandoned, and the cause is now before this statutory three-judge court for a determination on the merits.

The plaintiffs American Trucking Associations, Inc., The Contract Carrier Conference of American Trucking Associations, Inc., and National Automobile Transporters Association are motor carrier trade associations. The plaintiffs Convoy Company, Robertson Truck-A-Ways, Inc., Western Auto Transports, Inc., and Kenosha Auto Transport Corp., are motor common carriers authorized

to operate in one or more of the states affected by the extensions of Pacific Motor Trucking Company's contract operations authorized by the order. Robertson holds common carrier authority to transport automobiles and trucks, in initial movements, in truckaway service from the General Motors plants at Raymer and South Gate to points in Arizona, Nevada, and Oregon. The plaintiffs Hadley Auto Transport and B & H Truckaway are motor contract carriers. Hadley is authorized to transport in initial movements, in truckaway service, automobiles from points in Los Angeles County, California, which includes Raymer and South Gate, to points in Idaho and Montana, and from Oakland to points in Arizona, and automobiles and trucks from points in Los Angeles County to points in Arizona, Nevada, New Mexico, and Utah. B & H is authorized to transport automobiles, in truckaway and driveaway service, in initial movements, from Vernon, California, an incorporated community just outside Los Angeles, to points in Arizona and Nevada, and motor vehicles, except trailers, in initial movements from Vernon to points in Utah, Idaho, Oregon, and Washington, serving Raymer as a point within the Vernon commercial zone.

The United States and the Interstate Commerce Commission were named defendants. The United States was represented at the hearing on the motion for a temporary restraining order, and thereafter an answer was filed on its behalf stating:

> ". . . the United States does not participate in the defense of the Commission's order but does not oppose its defense."[1]

There has been no further participation by the United States in the proceedings.

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[1] This is of particular significance in view of the fact that the United States on occasion has seen fit to oppose actively orders of the Interstate Commerce Commission.

Pacific Motor Trucking Company and General Motors Corporation sought leave to intervene on behalf of the defendants. Their requests were granted, PMT, the applicant, and GM, the sole shipper involved, being the parties who would be most affected if the Commission's order should be set aside.

The question presented by this action is, to summarize, whether the Commission erred in authorizing extension of PMT's existing contract carrier authority to serve a single shipper, GM, and to transport a single commodity, new automobiles and trucks, from three GM plants in California to points within five western states which are stations on the rail lines of PMT's parent railroad, SP.

The plaintiffs challenge the order, contending the Commission erred in the following respects:

> "1. It ignored the provisions of the National Transportation Policy applicable in proceedings of the type under consideration;
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> "2. It ignored the mandate of the proviso of § 5(2)(b) [of the Interstate Commerce Act] which it must observe in cases of this kind except where special circumstances, not here present, justify an exception to the Congressional policy against performance of unrestricted truck service by railroads or their affiliates;
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> "3. It failed to follow its own precedent cases and failed to conform to decisions of the Supreme Court applicable to the proceedings under review;
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> "4. It failed to conform to the Congressional policy manifested by § 210 of the Interstate Commerce Act against dual operations."

Counsel for both sides agree as to the scope of judicial review permitted in such a case as this, namely, that an order of an independent body such as the Interstate Commerce Commission is not to be disturbed if the order is within the scope of the statute which the Commission

is authorized to administer and enforce, and is based upon adequate findings, which are supported by substantial evidence in the record. Counsel also recognize that this is so even though the court should disagree with the Commission's conclusion, since the Act is not rigid and confides broad discretion in the Commission. It is, therefore, the function and duty of this court to determine whether the order here under consideration comes within the prescribed legal limits.

Plaintiffs differ with the defendant Commission and the intervenors, PMT and GM, as to what are the statutory limits of the Commission's authority applicable to granting of contract carrier authority to a motor carrier which is the wholly owned subsidiary of a railway.

The basic statute which governs the issuance of motor contract carrier permits is § 209(b) of the Interstate Commerce Act [49 U.S.C. § 309(b)], as amended by the Act of August 22, 1957, Pub. 85-163, 71 Stat. 411.[2] See

[2] "209(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit

tion 209(b) in terms provides that issuance of such permits shall be subject to the limitation on issuance of dual contract and common carrier authority contained in § 210 of the Act [49 U.S.C. § 310]. Further, the Act must be read as a whole and the various sections interpreted and applied in the light of the national transportation policy [3]

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would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6); *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso."

[3] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to

and the policy underlying § 5(2)(b) [49 U.S.C. § 5(2)(b)].[4] It is not questioned that PMT's past operations for GM, as well as the extended operations authorized by the order, are those of a contract carrier by motor vehicle, as defined by § 203(a)(15), as amended August 22, 1957 [49 U.S.C. § 303(a)(15)].[5] Nor is there any question that the Commission had authority under § 209(b) to issue permits for the extended contract carrier operations, unless such permits to PMT, as a subsidiary of SP, were in violation of some other statutory provision.

The plaintiffs admit that there is no express provision prohibiting this grant of authority to PMT, but contend that the grant to a wholly-owned motor carrier subsidiary of a railroad of "unrestricted" authority to engage in common carrier operations in competition with independent motor carriers, is contrary to the public interest and national transportation policy as heretofore applied by the Commission and interpreted by decisions of the courts, including the Supreme Court.

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encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Act of Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899.

[4] *American Trucking Associations* v. *United States*, 355 U.S. 141, 151-2 (1957).

[5] "(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

The first question which must be resolved is therefore: How is § 209(b) to be interpreted in the public interest and in the light of the national transportation policy? Section 209(b) in terms provides:

> ". . . In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

The plaintiffs in their brief contended that this amendment of § 209(b) "has no bearing on the issues" in the instant case. During the oral argument counsel for plaintiffs admitted that this amendment of the statute was in effect and binding on the Commission at the time it issued the order complained of, but argued that it had no application to the factual situation involved in the order here under consideration. Plaintiffs argued that the legislative history of this provision shows that the reason for its adoption was to nullify the decision of the Supreme Court in *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409, 412, approving the right of contract carriers to seek new business to an extent that the carrier might become a common carrier in fact, remaining a contract carrier in name only. The effect of the court decision was remedied by a second sentence inserted in § 209(b) by the 1957 amendment; and whatever may have been the original reason for instituting the legislation which culminated in the 1957 amendment, § 209(b), as it read at the time the Commission issued this order, clearly directed consideration by the Commission of certain specific criteria in applying public interest and the national transportation policy to authorization of contract carrier permits.

The order here challenged shows on its face that the Commission did consider those criteria, making findings with respect to each of them.

As to the number of shippers to be served by the applicant and the nature of the service proposed, the Commission found the evidence established that PMT's sole purpose was to afford GM extended driveaway and truckaway transportation of new cars and trucks from GM's plants at Oakland, Raymer, and South Gate, California, and that PMT's equipment was to be assigned to the exclusive use of that shipper.

As to the effect of granting the permit upon the services of protesting carriers, both rail and motor, the Commission made detailed findings as to the amount of GM traffic theretofore handled, or not handled, by the protesting carriers, both rail and motor. Careful consideration was given to the probable loss of GM traffic by rail carriers in joint-line service with SP, if authority were granted to PMT to serve points beyond SP's line, and the probable loss to a motor carrier presently serving GM dealers in Washington and Alaska, if PMT should be authorized to operate within the State of Washington. The Commission also weighed the effect on other independent motor carriers, both common and contract, authorized to serve any of the areas affected by the proposed extension of authority. It found that Hadley, one of the two protesting contract carriers, was dedicated to serving Ford, GM's largest competitor, that B & H, the other protesting contract carrier, possessed limited authority for operations from Vernon, California, and had in the past served Studebaker-Packard, and that Robertson, a common carrier protestant, transported vehicles principally for Chrysler.

As to the effect denial of the permit would have upon the applicant and the shipper and the changing character of the shipper's requirements, the Commission found that

the shipper, GM, had established its need for extension of the personalized type of contract service which PMT had been rendering it, and rendering well, from other points for many years; that in view of the limited storage facilities maintained by GM at its plants, transportation service must be closely coordinated with plant operations to avoid congestion or delay in deliveries to dealers; that use of any other carrier would require outgoing shipments to be dispatched through the shipper's incoming gate, causing confusion and disarranging the operations at the plant, which are geared to use of PMT's services from its nearby yard. The proposed extension of service was supported by GM in order to obtain faster transportation on shipments requiring expedited handling, direct deliveries to dealers at off-rail points, more flexible and expeditious handling of consolidated shipments, and to meet the competition of other automobile manufacturers, notably Ford and Chrysler, which have motor services available. The Commission further found that, should the requested authority be denied, GM had indicated it would not use the services of the protesting motor carriers, but either would support an application for similar authority by an independent motor contract carrier presently serving a GM branch plant at Arlington, Texas, or would institute proprietary operations. The order further shows that denial of the permit would cause substantial damage to the applicant, PMT, which has dedicated its contract carrier service to GM operations for many years, acquiring special equipment to meet GM's needs, and that PMT's contract carrier operations for GM during the years 1953 through the first eleven months of 1956 averaged 86.35% of PMT's total contract carrier operations. Thus, although the Commission found an "absence of unusual conditions" which would justify the issuance of permits for service to points not on SP's rail line, there was, in the court's opinion, substantial evidence of special circumstances

justifying the extensions of PMT's contract carrier authority to serve GM.

All of the Commission's findings and conclusions are supported by substantial evidence in the record before it.

The plaintiffs contend that any grant of contract carrier authority to a motor carrier subsidiary of a railroad must be limited to operations which are "auxiliary or supplemental" to the rail operations, the test applied by the Commission in permitting unification, merger, or acquisition of control of a motor carrier by a railroad under § 5(2)(b); that such authority must be limited further by the five restrictions generally applied by the Commission, in the absence of special circumstances, in granting common carrier authority under § 207 to a motor carrier subsidiary of a railroad; and that such authority is subject to the prohibition against dual common and contract carrier authority under § 210.

The Commission denies that the limitations which it has administratively adopted in applying § 207 and § 5(2)(b) are applicable to the issuance of contract carrier permits under § 209, pointing out that it has already been determined in the *American Trucking Association* case, *supra*, 355 U.S. at 149-150, that § 5(2)(b) is not a rigid limitation upon issuance of common carrier permits under § 207, although the Act is to be read as a whole and the Commission properly considered the underlying policy of § 5(2)(b) as a "guiding light" in the exercise of its discretion under § 207. The Commission points out further that to apply to a § 209(b) contract carrier permit the five restrictions generally placed upon a § 207 common carrier certificate in the case of a motor carrier subsidiary of a railroad, would convert the contract carrier into a common carrier, and that the § 210 ban on dual operations applies to common and contract carriage by the same motor carrier or affiliated motor carriers, and

does not deal with dual operations by a railway and its motor carrier subsidiary.

The Commission concedes that the rationale which requires a reading of the Act as a whole and consideration of the policy underlying § 5(2)(b) as a guiding light in the issuance of § 207 common carrier certificates is equally applicable to the granting of § 209(b) permits for contract carrier operations. It contends that it did apply, insofar as practicable in dealing with an application for contract carrier authority, the policies underlying § 5(2)(b), § 207, and § 210, as well as the specific criteria laid down by the Congress in its 1957 amendment of § 209(b) for determining whether issuance of a contract carrier permit is consistent with the public interest and the national transportation policy.

That the Commission did apply the Act as a whole, giving effect to the policies underlying §§ 5(2)(b), 207, and 210, as well as carefully following the guide laid down by the Congress in § 209(b) for determining public interest and compliance with the national transportation policy, is borne out not only by the findings of fact recited in the Commission's order, but by its conclusions as to the scope of extended operations which would be in the public interest, and by the curtailed authority which the Commission granted.[6] It will be observed that

[6] ". . . We deem it of controlling significance here that in the territory under consideration automobiles are commodities which can be economically and advantageously transported by rail to on-rail points, and that the nature of the movements from these three California plants is such as to render it unlikely that a significant amount of freight would be diverted from Southern Pacific to its motor contract carrier subsidiary if the proposed service were limited to Southern Pacific points. It does not appear that the amount of traffic likely to be diverted under these conditions would be large enough to afford either Southern Pacific or applicant an unfair competitive advantage over other carriers or to constitute a destructive competitive threat to other automobile producers. On the other hand, use by General Motors of appli-

the requested authority was denied where it would encroach upon existing service by other carriers, and granted where the evidence of record showed that the proposed extension would have little or no effect upon present and future operations of the protestants.

True, the authority granted PMT by the Commission's order was not subject to all five of the restrictions which the Commission has generally, in the absence of special circumstances, seen fit to impose on *common* carrier certificates to motor carriers which are railway affiliates. The extended operations authorized, however—far from being "unrestricted" operations by PMT in the contract carrier field, as the plaintiffs have consistently referred to them—were restricted in many respects. The authority granted was limited to points already served by SP (so as not to affect adversely other railroads carrying GM traffic beyond SP to other rail points), and limited to points on the rail line of SP (so as not to cut in on territory which potentially might be served by inde-

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cant's proposed service on a Statewide basis would permit Southern Pacific to invade the territory served by other rail lines and by the existing motor carriers and would inevitably result in the diversion of a large percentage if not all of the traffic now moving in rail joint-line service. Such eventuality has in no way been justified and the public interest in forestalling it is apparent. . . . insofar as Southern Pacific points are concerned, the authority sought represents no more than a request by Southern Pacific to perform truck transportation, albeit contract-carrier transportation, to the same points it serves as a rail carrier. . . . it is clear that all of the traffic except that moving on government bills of lading is now originated by Southern Pacific, and that regardless of whether the Sub 37 application is granted or denied, as concerns rail points of the Southern Pacific, there will be little or no diversion to the existing independent motor operators. In other words, a grant of authority to applicant to serve only those points which are stations on the lines of Southern Pacific should not result in any appreciable alteration of the existing competitive situation and should not unduly restrain competition or in any degree adversely affect the operations of other carriers." (I.C.C. Order, Sheets 23-25.)

pendent motor carrier protestants), subject to the condition that "the permits authorizing such operations should be issued upon receipt of a written request from applicant for the imposition of a restriction against the transportation of automobiles and trucks" in its outstanding common carrier certificates (in the interest of avoiding the possibility of dual motor carrier operations), and the further condition "that there may from time to time in the future be attached to the permits granted such reasonable terms, conditions and limitations as the public interest and national transportation policy may require."

The court finds that the Commission's order violates no statutory prohibition, either in letter or in spirit, and that the authority granted thereby to PMT is in the public interest and in keeping with the national transportation policy, affording the shipper adequate, economical, and efficient service in a specialized field, and at the same time effecting no encroachment on the operations of other carriers or transportation media. Thus, the court court finds without merit plaintiffs' allegations of error numbered 1, 2, and 4.

As to the plaintiffs' third allegation of error, that the Commission failed to follow its own precedent cases and failed to conform to decisions of the Supreme Court applicable to the proceedings under review, the plaintiffs have pointed to no case determinative of the particular question here involved. Most of the cases cited deal with orders under § 5(2)(b) or § 207 and administrative practice in interpreting and applying those sections. At the argument, plaintiffs relied principally on the Supreme Court's decisions in *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), and *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141 (1957), affirming 144 F. Supp. 365. In both cases the Supreme Court upheld the Commission's administrative interpretation and application of § 207 in the light

of the policies underlying the Interstate Commerce Act as a whole and the national transportation policy. In the *Rock Island* case, the Court approved the Commission's imposition of five restrictions administratively adopted to insure that common carrier operations by a railway affiliate under a § 207 certificate would be "auxiliary and supplemental" to the rail operations in the absence of special circumstances justifying broader authority in the public interest, holding that the modification was authorized by the Commission's reservation, in the original § 207 certificate, of power to impose such further restrictions as subsequently might appear necessary. In the *American Trucking Associations* case the Court merely held that the Commission, in granting a § 207 common carrier certificate, had correctly given consideration to the policy underlying § 5(2)(b), although the latter section did not constitute a rigid limitation on § 207 certificates. The court finds the Commission's order in the instant case in harmony with the rulings in those cases.

For the foregoing reasons, the court concludes that the Commission in authorizing the extended operations by PMT acted within the limits of its statutory authority and did not exercise its discretion arbitrarily or capriciously; hence, the Commission's order must be upheld on the merits.

The intervenors have raised a further question, namely, the standing of the plaintiffs to bring this action. The intervenors contend that the complaint shows upon its face that none of the association plaintiffs is a "party in interest" authorized by § 205(g) of the Interstate Commerce Act [49 U.S.C. § 305(g)] to seek judicial review, or the equivalent "person suffering legal wrong because of any agency action" within § 10 of the Administrative Procedure Act [5 U.S.C. § 1009] and, further, that the complaint fails to include any allegation and there is an absence of proof that the motor carrier plaintiffs have

suffered or are threatened with damage or financial injury as the result of the Commission's order, so as to make them parties in interest entitled to bring suit. The intervenors urge that neither mere concern for obedience to law nor the mere possibility of stronger competition by virtue of the grant of new operating authority is sufficient to give the plaintiffs standing to bring this action to set aside the Commission's order, and that to constitute a "party in interest" under § 205(g) a plaintiff must show that some definite legal right possessed by him has been directly damaged or seriously threatened by the order. *Atchison, Topeka, and Santa Fe Railway Co.* v. *United States*, 130 F. Supp. 76, affirmed *per curiam* 350 U.S. 892 (1955). They point out further that the fact that the plaintiffs were permitted to intervene before the Commission does not alone furnish a basis for plaintiffs' required "interest". *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U.S. 479 (1930).

The defendant Interstate Commerce Commission did not raise the issue of standing, and the question was argued by the intervenors after the court had heard the case on the merits.

A majority of the court find that the association plaintiffs obviously are not persons possessed of some legal right directly and adversely affected by the administrative action, entitling them to bring an action to set aside the Commission's order. The majority further find that, not only is the complaint devoid of any allegation of direct injury, present or threatened, to the motor carrier plaintiffs by granting of the extension of operating authority to PMT, but, at the hearing on the merits, there was no showing of actual or anticipated direct injury such as would entitled them to institute this action. Had the complaint been filed by some qualified "party in interest," all of the plaintiffs would have had the right to

intervene under the provisions of 28 U.S.C. § 2323;[7] but the right to intervene presupposes the existence of an action brought by a proper plaintiff. Since none of the plaintiffs has alleged or shown standing to bring the action under the statutes providing for judicial review of the Commission's orders, it is the view of Judges Keech and Curran that the complaint must be dismissed on the further ground that plaintiffs lack standing to sue.

Judge Bastian concurs in so much of this opinion as deals with dismissal of the complaint on the merits.

Counsel will present an appropriate order dismissing the complaint (1) on the merits and (2) for lack of standing to sue.

/s/ WALTER M. BASTIAN, Circuit Judge.
/s/ RICHMOND B. KEECH, District Judge.
/s/ EDWARD M. CURRAN, District Judge.

January 20, 1959.

[7] 28 U.S.C. § 2323, third paragraph:

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections [section 2321 of Title 28 and sections 20, 23, and 43 of Title 49] may intervene in said action at any time after commencement thereof."

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Intervening Defendants.

JUDGMENT

The above-entitled cause came on for hearing before this statutory three-judge District Court on December 10, 1958, and the court having considered the pleadings, briefs, and oral argument on behalf of the parties, and having filed on January 20, 1959, its opinion on the issues presented,

It is hereby ordered, adjudged and decreed, that the complaint of the plaintiffs be, and it is hereby, dismissed

(1) on the merits, and (2) for lack of standing of the plaintiffs, or any of them, to bring this action; and the clerk is hereby directed to enter judgment for the defendants and intervening defendants, this 30th day of January, 1959.

/s/ WALTER M. BASTIAN, Circuit Judge.
/s/ RICHMOND B. KEECH, District Judge.
/s/ EDWARD M. CURRAN, District Judge.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-78787 (Sub-No. 34)[1]

PACIFIC MOTOR TRUCKING COMPANY EXTENSION—OREGON

Decided September 9, 1958

1. Upon reconsideration, in No. MC-78787 (Sub-No. 34), findings in prior report, 71 M. C. C. 561, affirmed. Operation by applicant as a contract carrier by motor vehicle of automobiles and trucks, except trailers, in initial movements, in truckaway service, from a specified plant site in Oakland, Calif., to named points in Oregon, over irregular routes, found consistent with the public interest and the national transportation policy.

2. In No. MC-78787 (Sub-No. 35), operation by applicant as a contract carrier by motor vehicle of automobiles and trucks, except trailers, in initial movements, in truckaway and driveaway service, from a specified plant site in Oakland, Calif., to Austin, Tonopah, and Yerington, Nev., over irregular routes, found consistent with the public interest and the national transportation policy.

[1] This report also embraces No. MC-78787 (Sub-No. 35), Pacific Motor Trucking Company Extension—New Motor Vehicles to Additional Nevada Points; No. MC-78787 (Sub-No. 36), Pacific Motor Trucking Company Extension—New Motor Vehicles, Raymer, Calif., to Arizona; and No. MC-78787 (Sub-No. 37), Pacific Motor Trucking Company Extension—Automobiles—California Assembly Plants to Seven Western States.

3. In No. MC-78787 (Sub-No. 36), operation by applicant as a contract carrier by motor vehicle of automobiles and trucks, except trailers, in initial movements, in truckaway and driveaway service, from a specified plant site in Raymer, Calif., to named points in Arizona, found consistent with the public interest and the national transportation policy.

4. In No. MC-78787 (Sub-No. 37), operation by applicant as a contract carrier by motor vehicle, in initial movements, in truckaway and driveaway service, (1) of automobiles and trucks, except trailers, (*a*) from a specified plant site in Oakland, Calif., to named points in Arizona, New Mexico, and Utah and (*b*) from a specified plant site in Raymer, Calif., to named points in Nevada, New Mexico, Oregon, and Utah, and (2) of automobiles, in truckaway and driveaway service, from a specified plant site in South Gate, Calif., to named points in Arizona, Nevada, Oregon, and Utah, found consistent with the public interest and the national transportation policy.

5. Holding by applicant of the permits authorized herein and of certificates heretofore issued, found consistent with the public interest and the national transportation policy.

6. Issuance of the permits authorized herein approved upon compliance by applicant with certain conditions, and applications in all other respects denied.

William Meinhold, Stanfield Johnson, Thormund M. Miller, Robert L. Pierce, and *Edward M. Reidy* for applicant.

Walter R. Frizzell for intervener in support of the applications No. MC-78787, subnumbers 35, 36, and 37.

Henry M. Hogan for same intervener in No. MC-78787 (Sub-No. 36) and No. MC-78787 (Sub-No. 37).

Phil Jacobson, Peter T. Beardsley, Fritz R. Kahn, G. G. Andersen, R. W. Cronon, John J. Burchell, Frank S.

Farrell, Clair G. Anderson, Louis E. Smith, Marvin Handler, Walter N. Bieneman, Clarence D. Todd, Charles W. Singer, Joseph E. Earp, and *Charles B. Myers* for protestants and interveners in opposition.

John G. Lyons for intervener in opposition in No. MC-78787 (Sub-No. 34), and as its interests might appear in No. MC-78787, sub-numbers 35, 36, and 37.

Reginald L. Vaughn for intervener as its interest might appear in No. MC-78787 (Sub-No. 37).

REPORT OF THE COMMISSION ON ORAL ARGUMENT[2]

BY THE COMMISSION:

These 4 related applications were orally argued on a consolidated record and will be disposed of here in 1 report. The No. MC-78787 (Sub-No. 35) and No. MC-78787 (Sub-No. 36) applications were heard on a consolidated record and the No. MC-78787 (Sub-No. 34) and No. MC-78787 (Sub-No. 37) applications on separate records. The title proceeding has been subject of a prior report on oral argument, 71 M. C. C. 561.

No exceptions were filed to the examiner's recommended order in the No. MC-78787 (Sub-No. 35) proceeding but it was stayed by us. The No. MC-78787 (Sub-No. 36) and No. MC-78877 [*sic*] (Sub-No. 37) applications have been subject of recommended reports, to which exceptions and replies have been filed. General Motors Corporation, hereinafter called General Motors, supports, and American Trucking Associations, Inc., and Contract Carrier Conference of American Trucking Associations, Inc., hereinafter called ATA and the conference, respectively, oppose the applications. Our conclusions differ slightly from those recommended in each proceeding. Exceptions, contentions, and requested findings not discussed in this

[2] On reconsideration and oral argument in the title proceeding.

report nor reflected in our findings or conclusions have been considered and found not justified.

By the title application filed October 14, 1955, as amended, Pacific Motor Trucking Company, a corporation, of San Francisco, Calif., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of new Chevrolet automobiles, new Chevrolet trucks, and new Chevrolet buses, in initial movements, in truckaway service, from the sites of Chevrolet plants Nos. 1 and 2 in Oakland, Calif., to points in Oregon which are stations on the lines of the Southern Pacific Company, hereinafter called Southern Pacific, over irregular routes.

In the No. MC-78787 (Sub-No. 35) application filed March 5, 1956, as amended, the same applicant seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of new automobiles, new trucks, and new buses, except trailers, in initial movements, in truckaway and driveaway service, from Oakland, Calif., to Austin, Tonopah, and Yerington, Nev., over irregular routes. Dallas & Mavis Forwarding Co., Inc., opposed this application at the hearing.

By its No. MC-78787 (Sub-No. 36) application filed March 9, 1956, as amended, the same applicant seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of new automobiles, new trucks, and new buses, except trailers in initial movements, in truckaway and driveaway service, from Raymer, Calif., to points in Arizona which are stations on the rail lines of the Southern Pacific, over irregular routes. Robertson Truck-A-Ways, Inc., a motor common carrier, and two motor contract carriers, B & H Truckway and Hadley Auto Transport, hereinafter called Robertson, B & H, and Hadley, respectively, oppose this application.

In the No. MC-78787 (Sub-No. 37) application filed October 23, 1956, the same applicant seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle (1) of new automobiles, new trucks, and new buses, except trailers, in initial movements, in truckaway and driveaway service, (*a*) from the sites of the General Motors Chevrolet plants at Oakland, Calif., to points in Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, and Washington, except points in Oregon and Nevada which are stations on the rail lines of Southern Pacific, and except Carson City, Minden, Austin, Tonopah, and Yerington, Nev., and (*b*) from the site of the General Motors Chevrolet plant at Raymer, Calif., to points in Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, and Washington, except points in Arizona which are stations on the rail lines of the Southern Pacific; and (2) new automobiles, except trailers, in initial movements, in truckaway and driveaway service, from the site of the General Motors Buick-Oldsmobile-Pontiac plant at South Gate, Calif., to points in Arizona, Idaho, Montana, Nevada, Oregon, Utah, and Washington, over irregular routes. Nine carriers by railroad, nine motor carriers, and National Automobile Transporters Association, hereinafter called NATA, oppose the application. Insured Transporters, Inc., intervened as its interest might appear in all proceedings.

PRELIMINARY DISCUSSION

No. MC-78787 (Sub-No. 34).—In the prior report in the No. MC-78787 (Sub-No. 34) application we found that applicant should be granted a permit authorizing the transportation of automobiles and trucks, in initial movements, in truckaway service, from the site of General Motors Corporation's plant No. 1 at Oakland, Calif., to points in Oregon which are stations on the lines of the Southern Pacific, over irregular routes; and that the holding by applicant of such permit and those heretofore

issued to it, and of certificates heretofore issued to it authorizing motor common carrier operations in the same territory, would be consistent with the public interest and the national transportation policy. Thereafter, upon petitions of ATA and the conference, to which applicant replied, we reopened this proceeding for reconsideration on the present record solely with respect to whether the motor contract carrier authority granted therein should be made subject to the substituted-service restrictions usually imposed in certificates issued to rail carriers or motor affiliates of rail carriers. Subsequently this proceeding and the three other applications covered by this report were the subject of oral argument.

In their petitions in the No. MC-78787 (Sub-No. 34) proceeding and on oral argument, ATA and the conference contend (1) that the policy laid down by the Congress of restricting the motor-carrier operations of rail carriers or their subsidiaries to service which is auxiliary to and supplemental of rail service, as indicated in section 5 (2) (b) of the Interstate Commerce Act, consistently has been recognized by the Commission as being applicable to applications for common-carrier authority filed under section 207, and should be recognized as being equally applicable to requests for contract-carrier authority filed under section 209; and (2) that the Commission is without statutory sanction to allow railroads or their affiliates to perform unrestricted motor contract-carrier service; i. e., service which is not auxiliary to or supplemental of train service, whether the authority to perform such service is obtained through the medium of purchase under section 5 (2) (b) or as the result of an application filed under section 209. In reply applicant maintains that all issues arising under section 209 have been determined in the administrative consideration of the No. MC-78787 (Sub-No. 34) application, and that approval of unrestricted authority would be in

conformity with prior decisions[3] of the Commission granting it similar authority.

No. MC-78787 (Sub-No. 35) and No. MC-78787 (Sub-No. 36).—The examiner recommended that the No. MC-78787 (Sub-No. 35) application be granted, but restricted the origins to be served to the sites of the General Motors Chevrolet plant in Oakland. No exceptions were filed to the order recommended by the examiner, but it was stayed by division 1, in order to give consideration to the question of dual operations.

The joint board recommended that the No. MC-78787 (Sub-No. 36) application be granted, but with service at origin restricted to the plant site of the General Motors Chevrolet plant at Raymer. On exceptions, the opposing motor carriers urge that the board erred (1) in failing to find that there are existing motor carriers authorized and equipped to render the proposed service, (2) in recommending that applicant be granted authority to serve only those Arizona consignees at rail points, thereby discriminating against consignees at other points, (3) in recommending that driveaway service be authorized because no need therefor has been shown, (4) in finding that existing carriers would not be prejudiced by the recommended grant of authority, (5) in concluding that a grant of the application is justified since a denial would result in the continued movement of the traffic by the Southern Pacific, and (6) in predicating such grant upon the fact that the Southern Pacific maintains shipping

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[3] *Pacific Motor Trucking Co. Extension—Automobiles*, 42 M. C. C. 911 (1943); No. MC-78787 (Sub-No. 27), *Pacific Motor Trucking Co. Extension—New Automobiles*, 51 M. C. C. 860 (1950) (not printed in full), decided March 10, 1950; No. MC-78787 (Sub-No. 30), *Pacific Motor Trucking Co. Extension—Raymer*, 51 M. C. C. 861 (1950), (not printed in full), decided May 15, 1950; and No. MC-78787 (Sub-No. 31), *Pacific Motor Trucking Co. Extension—Carson City*, 63 M. C. C. 851 (1955) (not printed in full), decided March 7, 1955.

facilities adjacent to the plant site. In a joint reply applicant and General Motors aver that the evidence supports the board's recommendation and urge that it be approved.

No. MC-78787 (Sub-No. 37).—In the No. MC-78787 (Sub-No. 37) application the examiner recommended a grant of contract-carrier authority to transport (1) automobiles, trucks, and buses, except trailers, in initial movements, in truckaway and driveaway service, (*a*) from the site of the General Motors Chevrolet plant No. 1 at Oakland to points in Arizona, New Mexico, and Utah, and (*b*) from the site of the General Motors Chevrolet plant at Raymer to points in Nevada, New Mexico, Oregon, and Utah, and (2) automobiles, in initial movements, in truckaway and driveaway service, from the site of the General Motors' Buick-Oldsmobile-Pontiac Plant at South Gate to points in Arizona, Nevada, Oregon, and Utah, over irregular routes, with service restricted in each instance to points which are stations on the rail lines of the Southern Pacific.

Applicant and General Motors filed exceptions to the recommended partial denial of this application, and the opposing rail carriers separately, and Convoy Company, Western Auto Transports, Inc., and Kenosha Auto Transport Corporation, hereinafter called, respectively, Convoy, Western, and Kenosha, jointly replied. The contentions advanced by these parties on oral argument are for all practical purposes the same as those set forth in the last-mentioned exceptions and replies. Applicant asserts that the examiner erred in denying authority to points which are off the rail lines of the Southern Pacific and in failing to grant authority to all points covered by this application. Specifically, it argues (1) that the traffic involved accounts for only an insignificant fraction of the total operating revenues of the rail carriers connecting with the Southern Pacific, (2) that there is

nothing of record to indicate that a grant of the authority sought would seriously impair the operations of any of the rail protestants, (3) that applicant's past operations under contract for General Motors have been conducted at rates which provided a substantial margin of profit, (4) that there is no basis for the examiner's assumption that if unrestricted authority were granted, the Southern Pacific would be in a position to deprive its rail connections of participation in the traffic by manipulating the rates of its motor contract carrier subsidiary, (5) that the examiner's findings fail to give adequate recognition to the shipper's need for the proposed service to points not on the rail lines of the Southern Pacific, (6) that the restriction against such service is arbitrary and unrealistic in that there is a manifestly greater need for truck transportation to such points than to those served by the Southern Pacific, and (7) that a denial of the application to the extent recommended by the examiner would subject both it and the Southern Pacific to irreparable damage inasmuch as the shipper has indicated that it will institute proprietary operations or support the application of another motor contract carrier, with no rail affiliation, if the recommended findings are affirmed. General Motors challenges the imposition of the aforementioned restriction and the denial of authority to serve points in Idaho, Montana, and Washington, arguing that 80 percent or more of its dealers are located at points off the rail lines of the Southern Pacific.

In reply the opposing rail carriers maintain that all of applicant's present contract-carrier authority is restricted to Southern Pacific points, except that to Carson City and Minden, Nev., which are not on the line of any railroad; that the application represents an attempt by the Southern Pacific, through its motor subsidiary, to invade the territory of other railroads; that existing rail service cannot be deemed inadequate in face of the shipper's continued use of such service to points in California

and Oregon which applicant can presently serve; that a substantial volume of traffic would be diverted from the rail connections of the Southern Pacific to applicant if the restriction is lifted; and that an undesirable situation would be created whereby the Southern Pacific could through its subsidiary give a rate preference to General Motors on outbound shipments of finished automotive vehicles from its three California assembly plants, while at the same time applying the published common-carrier rail rates on shipments handled as a rail carrier for other automobile manufacturers. Western, Convoy, and Kenosha in a joint reply say that the application should be denied in its entirety, generally for the reasons advanced in the exceptions filed by Convoy and other opposing parties, which are summarized below.

Exceptions to the recommended partial grant of authority were separately filed by Convoy, ATA, the conference, and NATA, and jointly by Robertson, Hadley, and B & H. The joint exceptants advance substantially the same arguments as were made by them in the No. MC-78787 (Sub-No. 36) proceeding. The other exceptants collectively contend (1) that existing motor-carrier services have not been shown to be inadequate, (2) that the supporting shipper herein should not be permitted, through the expression of a mere preference, to obtain an additional carrier without regard to the adequacy of existing transportation facilities, (3) that the recommended findings are discriminatory, protecting the interests of the connecting rail lines, but authorizing a new and competing operation into a territory already served by a large number of regulated motor carriers, (4) that the examiner failed to give effect to the statutory prohibition contained in the proviso of section 5 (2) (b) against unrestricted truck operations by railroads or their affiliates, (5) that the proposed dual operations by applicant and its parent railroad presents the opportunity for unfair

competitive practices in violation of section 210, and (6) that the granting of the application will enable the Southern Pacific and applicant to maintain a virtual monopoly in the transportation performed by them for General Motors to and from its three California assembly plants. The conference argues that the application should be either denied in its entirety or restricted in such manner as to make the proposed service auxiliary to or supplemental of the rail service of the Southern Pacific. NATA takes the position (1) that a motor contract carrier subsidiary of a railroad should not be permitted to extend its operations except upon a specific showing that no other transportation service is available to the shipper, and (2) that approval of the application will be followed by unlawful, discriminatory, and destructive rate and pricing practices among competing transporters and automobile manufacturers in the involved territory, contrary to the public interest and national transportation policy.

In reply applicant contends (1) that because of the proximity of its receiving facilities and the integration of its service with the shipper's operations, it is the only carrier that can adequately meet the shipper's requirements for additional truck service, (2) that the opposing motor carriers are unable, either individually or collectively, to furnish the complete service desired, (3) that section 209 contains no specific provision requiring the imposition of unusual restrictions in permits issued to motor-carrier subsidiaries of railroads, (4) that contract carriage by its very nature cannot be auxiliary to, or supplemental of rail service, and (5) that the grants of contract-carrier authority in *Scott Bros., Inc., Extension of Operations—Jersey City*, 34 M. C. C. 163, to a motor subsidiary of The Pennsylvania Railroad Company and to itself in prior application proceedings without any restriction based upon rail ownership are controlling on the issue herein. Applicant further contends that the

proposed dual operations are consistent with the public interest and the national transportation policy; that at no time has any person, shipper, or carrier charged it with any of the practices impliedly interdicted by section 210; that the situation which would result from a grant of authority here is no different from that prevailing in California and Oregon at the time its previous dual operations were approved; and that it is willing to have its outstanding certificates restricted so as to exclude the right to transport assembled automobiles, trucks, and buses. General Motors in its reply asserts that protestants' allegations of error in the examiner's report are without support in the record.

The evidence adduced in the No. MC-78787, subnumbers 35, 36, and 37 proceedings, the examiner's or board's recommendations therein, and the exceptions and the replies thereto in the No. MC-78787 (Sub-No. 36) and No. MC-78787 (Sub-No. 37), proceedings have been considered. We find the examiner's or board's statement of facts in each proceeding, as corrected and supplemented below, to be adequate so far as necessary to a determination of the issues presented and adopt them as our own. Such facts and those set forth in the prior report in the title proceeding will be restated herein only to the extent necessary for a clear understanding of the issues presented.

PRESENT AND PROPOSED OPERATIONS OF APPLICANT

Applicant, a wholly owned subsidiary of the Southern Pacific Company, a common carrier by railroad, presently holds various certificates issued by this Commission authorizing the transportation as a common carrier of general commodities, with certain exceptions, between points in California, Oregon, Nevada, Arizona, New Mexico, and Texas, generally over regular routes paralleling generally the rail lines of the Southern Pacific. This

common-carrier authority, except between certain origins and destinations in Oregon and California, is, with minor exceptions, restricted to service which is auxiliary to or supplemental of the rail service of its proprietary railroad. Applicant also holds permits authorizing operations as a contract carrier by motor vehicle of new automobiles, new trucks, and new buses, in initial movements, in driveaway and truckaway service, (1) from Oakland to Hawthorne, Carson City, and Minden, Nev., and points in Nevada which are stations on the rail lines of the Southern Pacific, (2) from Raymer, Calif., to points in the Los Angeles Harbor commercial zone, and (3) between Los Angeles and Calexico and San Ysidro, Calif. All of its present contract-carrier operations are performed for General Motors from assembly plants at Oakland, South Gate, and Raymer, Calif., in equipment especially designed for that purpose and dedicated to the shipper's exclusive use.

On January 3, 1958, division 1 found that applicant's operations, as of that time, were in conformance with the definition of a contract carrier in section 203 (a) (15), as amended August 22, 1957, and which reads:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Applicant proposes to render a service only for General Motors, the only shipper it presently serves, and to assign its equipment to the exclusive use of that shipper.

Clearly its proposed service will be that of a contract carrier. In accordance with section 209 (b), as amended, any authority granted to applicant in these proceedings will be limited to service for General Motors. Upon a review of all of the evidence of record, we conclude that subject to a discussion hereinafter of the dual-operations issue under section 210 and certain other matters, a need has been established by the supporting shipper in the No. MC-78787 (Sub-No. 34) and No. MC-78787 (Sub-No. 35) proceedings for the transportation of automobiles and trucks, in initial movements, from the site of General Motors' plant No. 1 at Oakland (1) in truckaway service to points in Oregon which are stations on the lines of the Southern Pacific, and (2) in truckaway and driveaway service to Austin, Tonopah, and Yerington. No need has been shown for the proposed transportation of buses.

In the No. MC-78787 (Sub-No. 36) application, applicant proposes to transport new automobiles and trucks from the General Motors Chevrolet plant at Raymer to dealers located at points in Arizona which are stations on the lines of the Southern Pacific. General Motors has used applicant's service exclusively for the motor transportation of its vehicles to various points in California and Nevada. It has shipped automobiles and trucks to the considered Arizona points principally by rail via the Southern Pacific, but desires the proposed service in order to effect faster as well as more direct deliveries to its dealers. It also expects to have some need for driveaway service in the movement of oversized chassis too big to load in a boxcar or on a truck. Its plant at Raymer is adjacent to yard facilities owned by the Southern Pacific and leased to applicant. Inasmuch as extensive storage facilities are not maintained at the Raymer plant, transportation service must be closely coordinated with plant operations to avoid congestion or delay in deliv-

eries to dealers. For these reasons, the shipper desires the exclusive service of one contract carrier so that there will be close cooperation and no division of responsibility. Use of any other carrier would require outgoing shipments to be dispatched through the shipper's incoming gate, causing confusion and disarranging the operations at the plant which are geared to the use of applicant's service from its nearby yard. During the first 6 months of 1956, the Raymer plant shipped 4,452 units by rail to points in Arizona on the lines of the Southern Pacific as compared with 792 units, or approximately 15 percent of the total, to other Arizona points.

Exceptants are authorized to conduct the proposed operations, have equipment suitable for the transportation of the shipper's vehicles, and are experienced in transporting the considered commodities. Robertson transports vehicles principally for the Chrysler Corporation; Hadley is under contract with and serves principally the Ford Motor Company; and B & H's contract-carrier service has been rendered principally for the Studebaker-Packard Corporation, which ceased assembling vehicles in this area approximately 30 days prior to the hearing herein.

In our opinion, the evidence reasonably establishes that General Motors requires from its Raymer plant a personalized service in the movement of its automobiles and trucks similar to that which is presently being rendered by applicant from other points. Applicant has served General Motors as a contract carrier for a number of years, and a grant of the authority sought would enable it to furnish a needed enlarged service. Inasmuch as the considered traffic has been moving principally by rail, institution of the proposed service should have no adverse affect on existing motor carriers. Since the evidence relates only to a need for service from the General Motors Chevrolet plant at Raymer, any authority granted

will be limited to that plant site as the point of origin and as above indicated will be restricted to service for a named shipper. Driveaway service and truckaway service are required by General Motors, and a grant of authority for both methods of transportation will enable applicant to furnish a complete service.

By its No. MC-78787 (Sub-No. 37) application applicant desires to enlarge the service proposed under its No. MC-78787, subnumbers 34, 35, and 36 applications from the General Motors Chevrolet plants at Raymer and Oakland to cover all points in the destination States rather than only to those which are stations on the rail lines of the Southern Pacific. It also proposes a new service from the General Motors Buick-Oldsmobile-Pontiac plant at South Gate. In addition to its Raymer and Oakland plants, General Motors maintains a plant for the assembly of Buick, Oldsmobile, and Pontiac automobiles at South Gate. The two Oakland plants are within the corporate limits of that city, and are designated as plants Nos. 1 and 2. Plant No. 1, so far as applicant is concerned, is the shipping point for both plants. The Raymer plant is in Los Angeles, Calif., at a rail point known as Raymer, and the South Gate plant is in South Gate, a point just outside Los Angeles. A small number of the automobiles and trucks manufactured at these three plants move on Government bills of lading in which the Government agency concerned, rather than General Motors, designates the transporter. These shipments have for the most part been handled by existing motor common carriers, including Convoy, Insured Transporters, Inc., and Robinson. The table below shows the total production and the number of vehicular units shipped from the Oakland and Raymer plants to points in the destination States covered by the No. MC-78787 (Sub-No. 37) application in 1955, not including interstate points presently served by applicant.

Destination States	Automobiles and commercial vehicles	
	Oakland	Raymer
Arizona	.....	2,453
Idaho	5,292	2,454
Nevada	122	885
New Mexico	.....	165
Oregon	5,401	297
Utah	41	6,113
Washington	24,805	473
Total	35,661	12,840
Total plant production	125,516	122,649

Production at the South Gate plant in 1955, is not shown of record. Actual movements by rail from the latter plant to points covered by the No. MC-78787 (Sub-No. 37) application for the first 3 months of 1955 were: 1,114 units to Arizona, 246 to Idaho, 36 to Montana, 550 to Nevada, 3,118 to Oregon, 221 to Utah, and 2,857 to Washington. Service with connecting rail carriers is required for deliveries in Washington, Idaho, Montana, eastern Oregon, southern Nevada, Utah, northern Arizona, and New Mexico. If the No. MC-78787 (Sub-No. 37) application is granted, all of the involved traffic moving by rail from Raymer and approximately one-half of that moving by rail from Oakland and South Gate would be diverted to applicant, with a concomitant decrease in the tonnage tendered to the connecting rail lines.

Applicant presently is providing General Motors with motor transportation in the movement of a substantial volume of traffic to intrastate points in California and to interstate points within the scope of its existing permits. Although it also holds temporary authority to serve points in Oregon, its service has not been used to that State. As at the Raymer plant, applicant's receiving

yards are immediately adjacent to the loading platforms at the Oakland and South Gate assembly plants and its motor operations are fully integrated with the shipper's manufacturing operations at those plants. Its operating ratio and net profit, respectively, on its contract-carrier operations for General Motors amounted to 87 percent and $90,699 in 1953; 83.7 percent and $119,375 in 1954; 86.8 percent and $174,879 in 1955; and 87.9 percent and $129,245 during the first 11 months of 1956.

The proposed service is supported by General Motors in order to obtain faster transportation on shipments requiring expedited handling; direct deliveries to dealers at off-rail points; more flexible and expeditious handling of consolidated shipments; and to meet the competition of other automobile manufacturers, notably, Ford and Chrysler, which have motor service available. As in the No. MC-78787 (Sub-No. 35) and No. MC-78787 (Sub-No. 36) applications, the shipper's representatives indicated that driveaway service will be required for occasional shipments of oversized vehicles too large to load in a boxcar or on a truck, and also for occasional emergency shipments of automobiles. The shipper desires the use of a motor contract carrier authorized to meet all of its requirements from each plant and is admittedly unwilling to utilize other existing motor facilities. It alleges that the existing common carriers are unable to offer the personalized and integrated service provided by applicant; that the services of the existing contract carriers are in some instances dedicated to service for its competitors; and that none of these carriers is as conveniently located for receiving its production as applicant. Should the requested authority be denied, General Motors indicates that it will either support the application of an independent motor contract carrier presently serving a branch plant at Arlington, Tex., identified as Texas Auto Transports, Inc., for similar authority, or institute proprietary operations.

Six rail and seven motor protestants presented evidence in opposition to the No. MC-78787 (Sub-No. 37) application. The rail protestants are (1) the Union Pacific Railroad Company which connects with the Southern Pacific at Los Angeles and serves points in Nevada, Utah, Idaho, and Montana, (2) the Northern Pacific Railway Company which connects with the Southern Pacific at Portland, Oreg., and serves points in Washington, Idaho, and Montana, (3) the Great Northern Railway Company which connects with the Southern Pacific at Portland and there receives traffic moving to destinations in Washington, Idaho, and Montana, (4) the Spokane, Portland and Seattle Railway Company, hereinafter called the Spokane, Portland & Seattle, a jointly owned subsidiary of the Great Northern and the Northern Pacific, operating between Portland, Oreg., and Spokane, Wash., (5) the Bamberger Railroad Company, hereinafter called the Bamberger, connecting with the Southern Pacific at Ogden, Utah, and operating between Ogden and Salt Lake City, Utah, and (6) the Portland Traction Company, a short-line carrier serving the Portland, Oreg., area. For the fiscal year ended August 31, 1956, the Union Pacific participated in the movement or delivery of 7,979 carloads of vehicular traffic from California points, the great majority originating at one or the other of the three General Motors California plants. All references to General Motors traffic in the discussion which follows relates to shipments of automobiles, trucks, or buses from these three plants to points in the destination States named in the application. The gross revenues derived from the traffic handled for General Motors amounted to approximately $1,073,000. In 1955, the Northern Pacific derived revenues of $366,000 and the Great Northern $370,599 on General Motors traffic received from the Southern Pacific, while in 1956 the Spokane, Portland & Seattle delivered 659 carloads, the Bamberger 185 carloads, and the Portland Traction Company approximately

2,290 carloads, of General Motors traffic. The connecting-line railroads fear the loss of all or a substantial portion of this traffic if the application is approved.

The opposing motor carriers are authorized and equipped to engage in truckaway or driveaway service and desire to participate in the shipper's traffic to the extent of their operating rights. Convoy, a common carrier, holds initial authority to transport automobiles and trucks, in truckaway service, from Richmond, Calif., to points in Idaho, Oregon, and Washington, serving Oakland, as a point in the Richmond commercial zone. It also holds secondary authority to deliver such vehicles to much of the destination territory here involved through interchange with motor carriers able to originate traffic at the shipper's other California plants. Its terminal closest to Oakland is at San Jose, Calif., 30 miles away. It is willing, however, to establish terminal facilities at or near the Oakland plant if assured sufficient traffic. It performs substantial truckaway operations for Ford from its plants at Maywood and Milpitas, Calif. Its authority from Richmond has been dormant since deactivation of the Ford plant at that point in 1955.

Transport Storage & Distributing Company is authorized to transport (1) new and used automobiles and trucks, in driveaway service, between Seattle, Wash., and points in Washington west of the summit of the Cascade Mountains, and Portland, and (2) automobiles and trucks, new or used, in secondary movements, in truckaway service, between Seattle, on the one hand, and, on the other, Portland and points in Washington, over irregular routes. It maintains warehouse and storage facilities at Seattle and Portland and operates, among other equipment, five trailers especially designed for transporting automobiles. Its operations consist of the storage, servicing, and delivery to dealers of new automobiles and trucks arriving at Seattle and Portland by

rail. It serves approximately 180 General Motors dealers in Washington and is the exclusive agent for all 10 General Motors dealers in Alaska. It alleges that the granting of the application would result in a loss of 65 percent of its total traffic and force a discontinuance of its operations. During the fiscal year ended June 30, 1956, it sustained a net loss of $6,746.

Hadley holds permits authorizing the transportation, in initial movements, in truckaway service, of automobiles from points in Los Angeles County, Calif., which includes Raymer and South Gate, to points in Idaho and Montana, and from Oakland to points in Arizona, and of automobiles and trucks from points in Los Angeles County to points in Arizona, Nevada, New Mexico, and Utah.

B & H, a contract carrier, is authorized to transport automobiles, in truckaway and driveaway service, in initial movements, from Vernon, Calif., an incorporated community just outside Los Angeles, to points in Arizona and Nevada, and motor vehicles, except trailers, in initial movements, from Vernon to points in Utah, Idaho, Oregon, and Washington, serving Raymer as a point within the Vernon commercial zone. Robertson holds certificated authority to transport automobiles and trucks, in initial movements, in truckaway service, from the General Motors plants at Raymer and South Gate to points in Arizona, Nevada, and Oregon.

By agreement between the parties the evidence of the two opposing motor carriers next discussed and of NATA was submitted by verified statements. Western Auto Transports, Inc., hereinafter called Western, holds certificated authority to transport new automobiles and trucks, in truckaway service in initial movements, from, among other points, Raymer and South Gate to points in Utah and new automobiles, in truckaway service, in secondary movements, between points in California, Idaho, Nevada, Utah, and Washington. It maintains terminals

at Los Angeles and Richmond and is fully equipped to handle the traffic. If requested by the traffic department of General Motors, it would file an application for authority to serve the General Motors plants at Los Angeles and Oakland to any destination territory beyond its present authority in the transportation of new automobiles and trucks in truckaway and driveaway service, as either a common or a contract carrier. Kenosha Auto Transports Corporation, which apparently lacks any authority to serve the shipper's California plants, is likewise willing to file application for common or contract-carrier authority if requested so to do by General Motors.

Subsequent to the hearing herein, pursuant to the findings in *Insured Transporters, Inc., Ext.—Automobiles, Oakland*, 74 M.C.C. 577, Insured Transporters, Inc., was issued a certificate in No. MC-107227 (Sub-No. 47), dated April 21, 1958, authorizing the transportation of automobiles, in initial movements, in truckaway service, from the sites of the General Motors assembly plants in Oakland to points in Arizona, California, Colorado, Montana, Nevada, New Mexico, Utah, and Wyoming, over irregular routes. This application was supported by various agencies of the United States Government, but not by General Motors.

NATA points out that with respect to the area involved in the instant application, the two other major automobile companies each has west coast manufacturing plants from which automobiles are distributed to points in Western States; that Ford has plants at Maywood and Long Beach in the Los Angeles area and at Milpitas, Calif., in the San Francisco area; that Chrysler has a plant at Maywood; that the various rail carriers serving this territory, including the Southern Pacific, publish group rates on automobiles from all manufacturing origins in the Los Angeles and San Francisco areas to common destinations; and that thus each automobile manufacturer is

charged the same common-carrier rail rates as its competitors from such origins.

A review of the evidence in the No. MC-78787 (Sub-No. 37) proceeding establishes a need for applicant's proposed service in the movement of new automobiles and trucks from the sites of the three California assembly plants of General Motors at Oakland, Raymer, and South Gate only to those points in the destination States recommended by the examiner which are stations on the rail lines of the Southern Pacific. We deem it of controlling significance here that in the territory under consideration automobiles are commodities which can be economically and advantageously transported by rail to on-rail points, and that the nature of the movements from these three California plants is such as to render it unlikely that a significant amount of freight would be diverted from the Southern Pacific to its motor contract carrier subsidiary if the proposed service were limited to Southern Pacific points. It does not appear that the amount of traffic likely to be diverted under these conditions would be large enough to afford either the Southern Pacific or applicant an unfair competitive advantage over other carriers or to constitute a destructive competitive threat to other automobile producers. On the other hand, use by General Motors of applicant's proposed service on a statewide basis would permit the Southern Pacific to invade the territory served by other rail lines and by the existing motor carriers and would inevitably result in the diversion of a large percentage if not all of the traffic now moving in rail joint-line service. Such eventuality has in no way been justified, and the public interest in forestalling it is apparent. The shipper's argument that motor service is needed to non-rail points to meet the competition of other automobile producers can be accorded little probative weight in face of its continued refusal to make use of the available services of the protesting motor carriers. The fact that both

General Motors and applicant have cooperated to permit the latter to establish receiving yards adjoining the former's assembly plants and thereby to block the use by other carriers of normal egress routes, has no bearing upon the adequacy or inadequacy of existing motor transportation facilities. On the other hand, insofar as Southern Pacific points are concerned, the authority sought represents no more than a request by the Southern Pacific to perform truck transportation, albeit contract-carrier transportation, to the same points it serves as a rail carrier. Motor protestants argue that the grant of authority to such points as recommended by the examiner reflects a discriminatory bias favoring the protesting railroads and penalizing the protesting motor carriers. However, it is clear that all of the traffic except that moving on Government bills of lading is now originated by the Southern Pacific, and that regardless of whether the No. MC-78787 (Sub-No. 37) application is granted or denied, as concerns rail points of the Southern Pacific, there will be little or no diversion to the existing independent motor operators. In other words, a grant of authority to applicant to serve only those points which are stations on the lines of the Southern Pacific should not result in any appreciable alteration of the existing competitive situation and should not unduly restrain competition or in any degree adversely affect the operations of other carriers.

Authority to transport trucks includes authority to transport trailers, and accordingly trailers will be excluded from any grant of authority herein. Although the need for driveaway service is not so great as that for truckaway, both are required by the shipper and a grant of authority for both methods of transportation will enable applicant to furnish a complete service.

As seen, the proof in connection with each of the considered applications, in our opinion, justifies a grant of some authority. Protestants, however, in various pleadings and at oral argument contend that all four of the considered applications should be denied (1) because the proviso in section 5 (2) (b)[4] must be read into section 209 and operates as a bar to the issuance of a contract-carrier permit to an applicant railroad or an applicant railroad subsidiary, and (2) because the holding by applicant of the permits it seeks herein and its presently held certificates would not be consistent with the public interest and the national transportation policy.

After careful study we are impelled to disagree. Our statutory authority to impose terms and conditions in permits issued under section 209 is derived from part (b) of that section, and not from section 5 (2) (b). The rejection by the Commission of a similar contention with respect to section 207 in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M. C. C. 91, 100, was sustained by the United States Supreme Court on December 9, 1957, in *American Trucking Assns., Inc., v. United States*, 355 U. S. 141, subsequent to the argument in these cases. Therein the Supreme Court held that the Congress did not intend the rigid requirement of section 5 (2) (b) to be considered as a limitation on certificates issued under section 207 but added, pages 151-152):

> that the underlying policy of § 5 (2) (b) must not be divorced from proceedings for new certificates under § 207. Indeed the Commission must take "cog-

[4] This provides that the Commission shall not authorize a railroad or its affiliate to acquire a motor carrier unless it finds that "the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

> nizance" of the National Transportation Policy and apply the Act "as a whole.". But for reasons we have stated we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding.

Although the Court, in that proceeding, was dealing only with applications for common-carrier certificates, we think that undoubtedly the same principle applies here where contract-carrier permits are sought and in reaching the conclusions above indicated; namely, that some authority should be granted in each proceeding, we have, in fact, given due consideration to the national transportation policy and to the principles which underlie section 5 (2) (b).

While we have power to impose restrictions in any permit granted authorizing motor contract carrier operations, such action is not required by either section 5 (2) (b) or the provisions of the national transportation policy; and it remains to be considered next whether any restrictions should be imposed here. The restrictions usually imposed in common-carrier certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service are: (1) the service by motor vehicle to be performed by rail carrier or by a rail-controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, (2) applicant shall not serve any point not a station on the railroad, (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, (4) all contracts between the rail carrier and the motor carrier shall be reported to the Commission and shall be

subject to revision if and as the Commission finds it to be necessary in order that such arrangements shall be fair and equitable to the parties, and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service. However, if warranted by special circumstances, certificates have been issued without these restrictions to railroads or their affiliates, whether acquired by purchase as in *Louisville, N. A. & C. R. Co.—Purchase—Meerman*, 45 M. C. C. 6, and *Pacific Motor Trucking Co.—Pur.—Lowinel Trucking Co.*, 60 M. C. C. 373, or as the result of an application filed under section 207, as in *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*, 4[illegible] M. C. C. 425, *Burlington Truck Lines, Inc., Extension—Iowa*, 48 M. C. C. 516, and *Rock Island Motor Transit Co. Com. Car. Application, supra.*

It has long been recognized by this Commission that substituted motor service in lieu of rail operations constitutes common carriage. *Substituted Freight Service*, 232 I. C. C. 683; *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M. C. C. 405; *Louisiana, A. & T. Ry. Co., Common Carrier Application*, 22 M. C. C. 213; *Hagerty Contract Carrier Application*, 26 M. C. C. 413, and *Siebert Extension—Woodbury and Elmer, N. J.*, 34 M. C. C. 340. In the two last-cited proceedings, the applicants sought permits to transport less-than-carload freight between stations on a railroad. Neither applicant proposed to have direct dealings with the general public, and each proposed to dedicate his equipment to the railroad exclusively. In each instance the proposed operations were found to be those of a common carrier, and the applicants therein were granted certificates limited to service auxiliary to or supplemental of rail service. Since substituted service is common carriage at rail rates and on rail billing, all of the restrictions usually em-

ployed to apply to substituted motor-for-rail service could not be imposed in a permit, for to do so would be to command the holder to render a common-carrier service. We conclude, therefore, that there is no basis for imposing the usual restrictions numbered 1, 3, or 5 in any permits which may be granted in these proceedings. On the other hand, we do not believe that Congress intended, except in unusual circumstances, to allow any railroad, through the medium of a motor subsidiary, to provide all-truck service as a contract carrier in competition with other rail lines and independently operated motor carriers without safeguards to insure that such service shall not be broader in scope than its rail operation. In the absence of any showing of unusual conditions in these proceedings, any permits issued to applicant will contain a territorial limitation of the service authorized to points which are stations on the Southern Pacific railroad. Also a restriction is warranted reserving to the Commission the right to impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest. Nothing in *Scott Bros., Inc., Extension of Operations—Jersey City, supra*, or in the proceedings in which applicant herein obtained unrestricted contract-carrier authority, is inconsistent with the foregoing.

DUAL OPERATIONS

The prior report in the No. MC-78787 (Sub-No. 34) proceeding fully discusses the dual-operation question and needs little enlargement of repetition. The issue was argued extensively previously, and the argument here is not convincing that a different conclusion is warranted. Another wholly owned motor-carrier subsidiary of the Southern Pacific, Southern Pacific Transport Company, holds certificates in No. MC-30310 and various subnumbers thereto authorizing substituted motor-for-rail service auxiliary to or supplemental of the rail operations of

the Southern Pacific and those of an affiliated rail line, the Texas and New Orleans Railroad Company, generally over regular routes between specified points in Texas and Louisiana. The additional dual operations occasioned by the grants of contract-carrier authority herein would not be such an aggravation of the existing dual operations of applicant or between applicant and the commonly controlled Texas subsidiary as to require disapproval. Compare *Texas Auto Transports, Inc., Contract Carrier Application*, 62 M. C. C. 473, 479, and *Complete Auto Transit, Inc.—Extension—Willow Run*, 71 M. C. C. 383, 388.

As indicated, the granting of the instant applications would allow applicant to serve the same shipper both as a contract and common carrier by motor vehicle and, through its parent, as a common carrier by rail. In the 54-page consolidated certificate issued to applicant in No. MC-78786, dated July 27, 1956, the 32 different commodity descriptions grouped together under an alphabetical key on sheets [illegible] through 39 include the descriptions "general commodities, except * * * assembled automobiles" in descriptions F, K, L, Z-1, and Z-6, and "general commodities" with no exceptions referring to assembled automobiles and trucks in descriptions D, H, J, N, S, T, U, Y, Z, and Z-3. Applicant has indicated its willingness to have its outstanding certificates specifically restricted against the transportation of assembled automobiles, trucks, and buses. Although there is no evidence which suggests that applicant has ever or is likely to transport such commodities as a common carrier in substituted motor for rail service, to forestall any possibility of discrimination because of the dual operations involved, our grants here will be made subject to the condition that applicant request in writing the imposition of a restriction against the transportation of automobiles and trucks in its outstanding certificates in No. MC-78786 and various subnumbers thereto which are not specifically restricted

against such transportation. However, our approval of the dual operations at this time should not be construed as any waiver of our right to reconsider this issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference.

FINDINGS

We find that operation by applicant, in interstate or foreign commerce, as a contract carrier by motor vehicle of the commodities and from and to the points indicated in connection with each application as set forth in the appendix hereto, over irregular routes, limited to the performance of transportation under a continuing contract or contracts with General Motors Corporation, and subject to the condition that there may from time to time in the future be attached to the permits granted herein such reasonable terms, conditions, and limitations as the public interest and national transportation policy may require, will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that permits authorizing such operations should be issued upon receipt of a written request from applicant for the imposition of a restriction against the transportation of automobiles and trucks in its outstanding certificates in No. MC-78786 and various subnumbers thereunder which are not specifically restricted against such transportation; and that the applications in all other respects should be denied.

We further find that the holding by applicant of the permits granted herein and those heretofore issued, and of the certificates heretofore issued to it authorizing common-carrier operations in the same territory, and the

holding by Southern Pacific Transport Company of the certificates heretofore issued to it, will be consistent with the public interest and the national transportation policy.

Upon compliance by applicant with the requirements of sections 215, 218, and 221 (c) of the act, with our rules and regulations thereunder, and with the requirements established in *Contracts of Contract Carriers*, 1 M. C. C. 628, appropriate permits will be issued. An order will be entered denying the applications except to the extent granted herein.

FREAS, *Chairman*, concurring in part:

I concur in the action taken by the majority, but would go further.

The 3 plants, respectively established by General Motors in 1914, 1936, and 1947, are served by 1 rail carrier, the Southern Pacific Company. In 1929, the Oakland plant commenced the use of a motor carrier whose operations were acquired by applicant herein in 1935. Applicant has continued to serve the Oakland plant in intrastate commerce since 1935 and also has served the other two plants in intrastate commerce since their establishment. In 1944, this Commission issued a permit to applicant authorizing the transportation of new automobiles, trucks, and buses, in initial movements, from Oakland to Hawthorne, Nev., and points in Nevada which are stations on the rail lines of the Southern Pacific Company. In 1950, similar transportation was authorized from Raymer to Los Angeles Harbor and from Los Angeles to Calexico and San Ysidro, Calif., and, in 1955, from Oakland to Carson City and Minden, Nev. General Motors pays the freight charges on shipments to its dealers and for all such traffic now employs either the rail service of the Southern Pacific Company and its rail-carrier connections or the motor-carrier service of applicant. It appears also that protestant Transport

Storage & Distributing Co. has been providing service from railheads to points in Washington for General Motors dealers.

In maintaining service for General Motors, applicant, at a substantial investment, has acquired an equipment fleet of 317 units, together with receiving and storage yards located adjacent to and operated as integral parts of the plants, and has developed a trained organization of some 200 people devoted exclusively to the transportation needs of the three General Motors plants. Applicant's contract-carrier operations are dedicated solely to service for General Motors. They have been conducted at a profit.

It is clear from the evidence that applicant has long been providing and is in position to render a bona fide contract-carrier service of highly personalized type particularly responsive to the distinct shipping requirements at the plants. Applicant's present operations are substantial and the proposed service is a logical and natural extension thereof, designed to meet the additional needs of the shipper.

The protesting motor carriers have obtained operating rights and acquired service facilities on the basis of the transportation needs of automobile manufacturers other than General Motors, which manufacturers are competitive therewith. With one exception the existing motor carriers have handled only a very negligible amount of the freight involved. Such carriers will, therefore, suffer, no loss of traffic as a result of the expanded service by applicant. A different result, however, will obtain in the instance of the rail-carrier connections of the Southern Pacific Company. The connecting rail carriers and protestant Transport Storage & Distributing Co. have shown that they will suffer loss of traffic and the corresponding revenues therefrom to the detriment of their services.

Considering and weighing, as we are now required to do under the amended provisions of section 209 (b), the effect which granting the application would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and its shipper, as well as the changing character of the shipper's requirements, it is my opinion that the record justifies the issuance of a broader permit in No. MC-78787 (Sub-No. 37). In the latter proceeding I would grant applicant authority to all of the destination points sought, except those which are stations on the lines of the connecting rail carriers of the Southern Pacific Company, but not stations on the lines of the latter, and except those in Washington served by Transport Storage & Distributing Co.

ARPAIA, *Commissioner*, dissenting:

Congress declared it a policy that the various forms of transportation be kept separate and competitive. The Commission has never deviated from applying this principle except where special and unusual circumstances demand it. The Supreme Court has confirmed this position in *American Trucking Assns., Inc.*, v. *United States*, 355 U. S. 141. It is for Congress and not for the Commission to change policy.

In the situation presented here, there are no special or unusual circumstances and the majority, in effect, admits this by granting a permit to the applicant, an affiliate of the Southern Pacific Company, for only a part of the service proposed. If true contract carriage were needed and the circumstances were compelling, then, logically, authority should be granted to all points to which the shipper professes a need for such service.

In essence, the majority has not only failed to follow congressional policy but has misapplied the congressional mandate. It has protected rail protestants against inva-

sion and competition yet has failed to extend protection to the motor-carrier protestants. To accomplish this result, on the same set of facts, the shipper is found to be adequately served in common carriage by existing rail connections. Such an anomalous result suggests inherent doubt as to the soundness of the majority's position. If the special circumstances which entitle the affiliate of a railroad to motor contract carrier authority are present, then there should be no compromise with the facts and the applicable principles.

COMMISSIONER MURPHY, with whom COMMISSIONER MCPHERSON joins, dissenting:

I am unable to agree with the view of the majority that dual operations may be approved and this rail subsidiary granted unrestricted motor-carrier authority.

Even if these issues were not present, I would be extremely reluctant to grant the authority sought as there has been no showing of a real need for the proposed service. There is adequate motor common and contract carrier service available and this record reflects nothing more than the shipper's preference for this applicant and its adamant refusal to utilize the services of other carriers.

The majority concedes that, in the absence of special circumstances, a grant of unrestricted motor common or contract carrier authority to a rail subsidiary is not justified; and I submit that in the face of the views expressed by the Supreme Court in *American Trucking Assns., Inc.*, v. *United States*, 355 U. S. 141, no other conclusion could possibly be reached. Obviously these special circumstances must involve something more than, as in these proceedings, the fact that a shipper would prefer and find it convenient to utilize the services of a given carrier and that apparently a grant of authority would not have a material adverse effect on the operations of

existing carriers. To satisfy this condition it must be shown that there is a compelling need for service that can only be met by the particular applicant. The grants of authority by this Commission in the *American Trucking Assns.* case, *supra*, and in *Scott Bros., Inc., Extension—Jersey City*, 34 M. C. C. 163, were based on findings that there was a total absence of satisfactory motor-carrier service. There is no merit to the contention of the majority that its action here is consistent with these decisions.

The majority has limited the grant of authority to service of points on the lines of the Southern Pacific Company. This limitation cannot be a substitute for the necessity of special or unusual conditions in these cases. This limitation merely defines the territorial scope of this grant of unrestricted motor-carrier authority and is actually of little real substance since it will permit the applicant to provide service at a majority of the important traffic centers in the destination territory involved. To these points the service authorized will be wholly unrestricted and if such a grant is proper, simple logic requires a similar grant to off-line points sought by the applicant. The fact of the matter is, however, that a grant of unrestricted authority, regardless of its extent, is not justified on this record.

The objectionable dual operations involved provide a further reason for denying these applications. This question is dealt with summarily in the report even though it is doubtful that there has been a proceeding before us in which exhaustive consideration of this issue was more justified. We have consistently held that the propriety of approving dual operations is to be carefully considered in every proceeding in which this question arises, including those involving subsequent applications by a carrier now conducting dual operations with our approval, and is to be determined upon the basis of the particular

circumstances of each case. I, therefore, do not consider of controlling significance, insofar as our disposition of this issue in the instant case is concerned, the fact that dual operations by this carrier have been approved in several unopposed application proceedings involving relatively limited contract-carrier operations. In my opinion, we would be entirely justified in withholding our approval of further expansion of this carrier's dual operations. The provisions of section 210 were clearly designed to preclude the authorization of both common and contract operations by the same motor carrier under circumstances in which an opportunity for undue preference and unjust discrimination would be created or expanded. In numerous cases, we have held that the mere opportunity for indulging in the unfair or discriminatory practices contemplated by section 210 is sufficient to bar approval of dual operations. It would be difficult to visualize a situation in which more opportunity for such practices would be present than in the instant case in which a single shipper will be served by applicant in its dual capacity as a common carrier of general freight and a contract carrier of automobiles and trucks and by the Southern Pacific as a common carrier by railroad. The applicant has wholly failed to show good cause for approval of the dual operations here involved, and the granting of approval under the circumstances of these cases establishes a precedent that will totally destroy the future effectiveness of section 210.

I, therefore, would deny the applications in their entirety.

COMMISSIONER MINOR, being necessarily absent, did not participate in the disposition of these proceedings.

COMMISSIONER WALRATH was necessarily absent but had he been present at the time of the adoption of the report by the majority he would have adhered to the position taken by him in the prior report (71 M. C. C. 567), and,

to the extent not inconsistent therewith, would have joined in the dissenting expressions of COMMISSIONERS ARPAIA and MURPHY.

COMMISSIONER GOFF did not participate in the disposition of these proceedings.

Appendix

Authority granted

No. MC-78787 (Sub-No. 34). Automobiles and trucks, except trailers, in initial movements, in truckaway service, from the site of General Motors Corporation's plant No. 1 at Oakland, Calif., to points in Oregon which are stations on the lines of Southern Pacific Company.

No. MC-78787 (Sub-No. 35). Automobiles and trucks, except trailers, in initial movements, in truckaway and driveaway service, from the site of the General Motors Corporation's plant No. 1 at Oakland, Calif., to Austin, Tonopah, and Yerington, Nev.

No. MC-78787 (Sub-No. 36). Automobiles and trucks, except trailers, in initial movements, in truckaway and driveaway service, from the site of the General Motors Corporation's plant at Raymer, Calif., to points in Arizona which are stations on the rail lines of the Southern Pacific Company.

No. MC-78787 (Sub-No. 37). (1) Automobiles and trucks, except trailers, in initial movements, in truckaway and driveaway service, (*a*) from the site of General Motors Corporation's plant No. 1 at Oakland, Calif., to points in Arizona, New Mexico, and Utah, and (*b*) from the site of the General Motors Corporation's plant at Raymer, Calif., to points in Nevada, New Mexico, Oregon, and Utah, and (2) automobiles, in initial movements, in truckaway and driveaway service, from the site of the General Motors Corporation's plant at South Gate, Calif., to points in Arizona, Nevada, Oregon, and Utah, with service restricted in each instance to points which are stations on the rail lines of the Southern Pacific Company.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-78787 (SUB-NO. 34)

PACIFIC MOTOR TRUCKING COMPANY EXTENSION—OREGON

Decided May 8, 1957

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1. Operation by applicant as a contract carrier by motor vehicle of automobiles and trucks in initial movements, in truckaway service, from a specified plant site in Oakland, Calif., to described points in Oregon, over irregular routes, found consistent with the public interest and the national transportation policy.
2. Holding by applicant of a permit as authorized herein and those previously issued, and of certificates heretofore issued, found consistent with the public interest and the national transportation policy.
3. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

William Meinhold and *Stanfield Johnson* for applicant.

John G. Lyons and *Phil Jacobson* for protestants and interveners in opposition to the application.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

No exceptions were filed to the order recommended by the joint board, but it was stayed by order of division 1. The parties have been heard in oral argument with respect to the dual operations issue arising under sec-

tion 210 of the Interstate Commerce Act. Our conclusions differ slightly from those recommended.

By application filed October 14, 1955, as amended, Pacific Motor Trucking Company, a corporation, of San Francisco, Calif., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, of new Chevrolet automobiles, new Chevrolet trucks, and new Chevrolet buses, in initial movements, in truckaway service, from the sites of Chevrolet plants Nos. 1 and 2, in Oakland, Calif., to points in Oregon which are stations on the lines of the Southern Pacific Company, over irregular routes. Insured Transporters, Inc., intervened as its interests might appear, and certain other motor common carriers made representations at the oral argument on the dual operations issue.

Applicant is a wholly owned subsidiary of the Southern Pacific Company. It presently holds various certificates issued by this Commission authorizing extensive operations as a motor common carrier between points in California, Oregon, Nevada, Arizona, New Mexico, and Texas, generally over regular routes, in the transportation of general commodities, with exceptions; and it also holds permits authorizing operations as a contract carrier by motor vehicle of new automobiles, new trucks, and new buses, in initial movements, in driveaway and truckaway service (1) from Oakland to Hawthorne, Carson City, and Minden, Nev., and points in Nevada which are stations on the rail lines of the Southern Pacific Company, (2) from Raymer, Calif., to points in the Los Angeles Harbor commercial zone, and (3) between Los Angeles and Calexico and San Ysidro, Calif. All of its contract-carrier operations are performed for the Chevrolet Division of General Motors Corporation. On June 29, 1955, it was granted temporary authority to transport new automobiles, new trucks, and new buses, in initial movements,

by the truckaway and driveaway methods, from Oakland to points in Oregon which are stations on the lines of the Southern Pacific Company, over irregular routes, but as of the date of the hearing herein in January 1956, it had not utilized such authority. Such temporary authority, which is substantially coextensive with the permanent authority here sought, is now conditioned to expire upon final determination of the instant application.

The board recommended that applicant be granted a permit authorizing operation as a contract carrier by motor vehicle of new automobiles, new trucks, and new buses, in initial movements, in truckaway service, from Oakland to points in Oregon which are stations on the rail lines of the Southern Pacific Company, over irregular routes, restricted to vehicles bearing the trade name "Chevrolet." The board also found that the holding by applicant of such a permit and its holding of a certificate authorizing common-carrier operations in the same territory would be consistent with the public interest and the national transportation policy.

No exception is taken to the board's statement of facts, and we adopt it as our own except to the extent some modification or enlargement thereon appears necessary or desirable for a discussion of the issues presented.

Division 1 stayed the taking effect of the order recommended by the board in order to give consideration to the propriety of the restriction mentioned above; namely, that limiting the service to be performed to the transportation of vehicles bearing the name "Chevrolet," and thereafter the proceeding was assigned for oral argument on the dual operations issue.

General Motors operates two assembly plants in Oakland. One, the so-called plant No. 1, assembles only Chevrolet automobiles. At plant No. 2, however, there are assembled Chevrolet trucks and buses and also GMC

trucks. Chevrolet trucks coming off the assembly line and destined for movement by applicant are driven to applicant's yard, which is adjacent to plant No. 1. GMC trucks coming off the assembly line are driven to the GMC yard adjacent to plant No. 2. The GMC trucks to be delivered by motor vehicle are handled exclusively by intervener Insured Transporters, Inc., and this carrier is apprehensive that if the instant application is granted, without a restriction such as that recommended by the board, it may lose some of its business to applicant. Chevrolet ships its trucks along with shipments of automobiles, and it is necessary that any carrier utilized to transport automobiles be in a position to handle both types of vehicles. Insured is not authorized to transport automobiles and hence its service would be of little use for the combined movement of Chevrolet trucks and automobiles.

In our opinion, commodity descriptions couched in terms of trade names are objectionable under any circumstances. The desired result may be otherwise obtained, however, (1) by restricting the transportation of trucks to those in mixed shipments with automobiles, or (2) by limiting the service to shipments from the site of plant No. 1. It is possible that occasions might arise when Chevrolet would desire to ship a straight load of trucks, and hence the restriction to the site of plant No. 1 appears to be preferable.

The record is silent concerning the proposed movement of buses, and, in fact, the shipper's representative indicated an interest in the proposed service only insofar as automobiles and trucks are concerned. Additionally, the service is to be performed only by the truckaway method, and there is no showing that the equipment to be utilized is capable of handling assembled buses. In the circumstances, and except for the provisions of section 210 of the act hereafter discussed, the record establishes a

need on the part of the supporting shipper for the transportation of new automobiles and new trucks, in initial movements, from the site of General Motors' plant No. 1, in Oakland, to points in Oregon on the lines of the Southern Pacific Company.

There remains the question of the propriety of granting applicant a permit authorizing operations of the scope indicated above while, at the same time, it also holds a certificate authorizing common-carrier operations in the same territory. Further, there is also a question as to whether we should grant such a permit in view of the extensive common-carrier rail service now provided in the territory by applicant's parent corporation, the Southern Pacific Company. True, the provisions of section 210 of the act are applicable only to instances involving the holding of certificates and permits authorizing the transportation of property by motor vehicle, but even without the statutory requirements we would be remiss in our duty were we to ignore the dual relationship between applicant, as a contract carrier by motor vehicle, and the Southern Pacific Company, as a common carrier by rail. We may inquire into the relationship incidental to the statutory findings necessary under section 209 of the act and in a proper case withhold a grant of authority or impose restrictions necessary to guard against the possibility of practices at which section 210 is aimed.

Insofar as concerns dual operations by applicant as a common carrier and as a contract carrier by motor vehicle, the contract-carrier operations here considered are not competitive with the common-carrier operations now conducted or authorized. Most of the common-carrier authority held by applicant is restricted against the transportation of automobiles and trucks, either specifically, or in the form of a restriction against the transportation of commodities requiring special equipment. The latter

restriction would not preclude the movement of a single car or truck on a unit of conventional equipment, but that type of movement is not practicable for an operation of the nature here considered, and the restriction operates as a bar to the use of the specialized equipment here contemplated to be used. Actually, applicant has never transported an automobile or a truck under its common-carrier authority, and it expresses a willingness to have any appropriate limitation imposed upon such authority to prevent it from so doing. Although the common-carrier and contract-carrier operations are not competitive, the granting of authority which would permit applicant to serve the same shipper, either at the same plant or at any other point, both as a contract carrier of automobiles and trucks and a common carrier of general freight, nevertheless requires careful scrutiny and special justification. The relationship between applicant and the railroad clearly opens the door for violation of the principles underlying section 210, even though not specifically covered by the statute. The granting of the instant application would permit the Southern Pacific Company to serve the same shipper, General Motors, both as a contract carrier by motor vehicle and as a common carrier both by rail and motor of general freight.

In defense of its position that such dual operations described above are not inconsistent with the public interest and the national transportation policy, applicant points out that the present situation has prevailed for many years, it having commenced its contract-carrier service for Chevrolet in 1935, in intrastate commerce; that at no time has any person, carrier or otherwise, charged it with any of the practices which section 210 is designed to prohibit; that the situation which would result from a grant of authority to extend its contract-carrier operations into Oregon is in no way different from that prevailing in California and Nevada at the time its previous dual operations were approved; and

that the situation, for all practical purposes is no different from that which has prevailed in the movement of California intrastate traffic for over 20 years, with the approval of the regulatory commission of that State. It further urges that it has expended large sums of money for equipment and other facilities in reliance upon the approval which we have heretofore granted with respect to dual operations and with respect to the grant of temporary authority which we made for contract-carrier operation of the scope here involved as far back as June 1955. It points out that the provisions of section 210 are not absolutely prohibitive of dual operations and that the history of the statute indicates an intent that dual operations shall be approved in meritorious cases.

Applicant's plea that it has relied upon our past approval of specific dual operations, we think, is without merit. Each successive grant of common- or contract-carrier authority which would result in dual operations must, under the statute, be accompanied by a finding that such resultant dual operations will be consistent with the public interest and the national transportation policy. Each such finding must be based upon the circumstances existing at the time the particular grant is made, and each case must be decided on its own merits. Certainly, the express provisions of the act place applicant on notice that it should not rely upon a grant of temporary authority to foreshadow a subsequent grant of corresponding permanent authority.

In other respects, however, we agree with the applicant. Chevrolet, unlike other General Motors divisions for reasons satisfactory to it, definitely prefers to use contract carriers. We have no desire to coerce it into any different position or control its decision in any way. Applicant's past satisfactory performance in a dual capacity has been without criticism. These facts plus the fact that it is only serving a single shipper as a contract

carrier and would not appear by the grant of authority here considered to be able to do otherwise, the fact that a denial of the instant application would deprive that shipper of a needed service which no other motor carrier is in a position to perform, and the lack of opposition on the part of other carriers, convinces us that we properly may approve the resultant dual operations.

We find that operation by applicant, in interstate or foreign commerce, as a contract carrier by motor vehicle of automobiles and trucks, in initial movements, in truck-away service, from the site of General Motors Corporation's plant No. 1, at Oakland, Calif., to points in Oregon which are stations on the lines of the Southern Pacific Company, over irregular routes, will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a permit authorizing such service should be granted; and that in all other respects the application should be denied.

We further find that the holding by applicant of the permit granted herein and those heretofore issued, and of the certificates heretofore issued to it authorizing common-carrier operations in the same territory, will be consistent with the public interest and the national transportation policy.

Upon compliance by applicant with the requirements of sections 215 and 218 of the act, with our rules and regulations thereunder, and with the requirements established in *Contracts of Contract Carriers,* 1 M. C. C. 628, an appropriate permit will be issued. An order will be entered denying the application except to the extent granted.

WALRATH, *Commissioner*, dissenting:

I am not in agreement with the conclusions of the report with respect to dual operations. Approval of the holding of a certificate and a permit by applicant may be made only upon a showing of good cause under the language of section 210 of the act. In my opinion, the record does not present any basis for finding that the dual operations, which would result from a grant of contract-carrier authority, will be consistent with the public interest and with the national transportation policy. Rather, it forces me to a contrary conclusion. The prohibition against dualism in carrier operations was clearly designed to prevent the possibility of undue preference and unjust discrimination. While the statute speaks only of motor-carrier operations, here we are faced with approving the issuance of a contract-carrier permit to a certificated common carrier which is completely controlled by a rail carrier. Notwithstanding past performances in a dual capacity, without complaint or charge of discriminatory practices, the authorization of additional contract carriage by applicant will compound a situation already fraught with the peril which the prohibition was intended to prevent. Surely, the ability to serve a shipper in connection with its unquestionably extensive volume of inbound general freight traffic as a rail carrier and as a motor common carrier, as well as to provide service on the outbound traffic of automobiles and trucks both as a rail carrier and a motor contract carrier, places such a carrier in a peculiarly advantageous position to favor the shipper, even where the motor contract carrier service is limited to points which are stations on the principal's rail lines. Thus, the possibility of preferential and discriminatory practices far outweighs the recognition in this case of the preference of a single shipper and the other reasons mentioned in the report as justifying a finding that good cause exists for approving applicant's operating as both a common and contract carrier within the same territory.

McPherson, *Commissioner*, dissenting:

I do not agree with the statement in this report that applicant is unable to transport automobiles under its general-commodity operating authority. See *L. C. Jones Trucking Co. Extension—The Dakotas*, 62 M. C. C. 539. Applicant, under the grant herein, will therefore be able to transport automobiles as both a common carrier and a contract carrier. The Southern Pacific Company, of which applicant is a wholly owned subsidiary, may transport automobiles in rail service. In view of these facts, I believe that all will agree that a very serious question is presented with respect to the extent to which operations contemplated by section 210 of the act will be authorized.

I agree that in general each situation in which dual operations are involved must be considered on its own merits, and I am considerably impressed by the fact that no instances of discrimination or other improper practices with respect to the parties or operations here involved have been brought to our attention, but I do not believe that approval of the dual operations which would result here can be based on the absence of criticism with respect to past operations. Although applicant may be able to serve only one automobile and truck manufacturer as a contract carrier, it is able to serve several others as a common carrier, in the same general territory and on the same as well as different commodities. The opportunities for indulging in unfair or discriminatory practices are very great. The mere possibility is usually sufficient to be a bar to approval of dual operations. See *C. A. Conklin Truck Line, Inc.—Dual Operation*, 44 M. C. C. 463. In the circumstances, I am unable to find the good cause which the act requires before we may approve dual operation, and, therefore, I feel compelled to deny the application.

Commissioners Freas, Winchell, and Murphy did not participate in the disposition of this proceeding.

APPENDIX D

NATIONAL TRANSPORTATION POLICY

[September 18, 1940.] [49 U.S.C., preceding § 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

Sec. 5. [As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.] [49 U.S.C. § 5.]

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(2)(a) It shall be lawful, with the approval and authorization of the Commission, is provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in Section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reason-

able, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

ISSUANCE OF CERTIFICATE

Sec. 207. [August 9, 1935.] [49 U.S.C. § 307.] (a) Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE

Sec. 209. [August 9, 1935, June 29, 1938, September 18, 1940, September 1, 1950, and August 22, 1957.]

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(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms,

conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation or its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

DUAL OPERATIONS

Sec. 210. [August 9, 1935, amended September 18, 1940] [49 U.S.C. § 310.] Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

(1) No person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation

for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

(2) No person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory.